

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41302

L'OREAL COSMETIC & FRAGRANCE DIVISION/COSMAIR, INC.
AND COSMAIR, INC.--PETITION FOR DECLARATORY ORDER--
A.C.T. TRUCK LINES, INC.

Decided: October 31, 1996

This proceeding arises out of the efforts of A.C.T. Truck Lines, Inc. (ACT or respondent) to collect undercharges from L'Oreal Cosmetic & Fragrance Division/Cosmair, Inc. and Cosmair, Inc. (L'Oreal or petitioner) for certain shipments transported during 1990. Because we find that L'Oreal was not the shipper here, we conclude that ACT cannot collect undercharges from it. Accordingly, we will dismiss the proceeding.

BACKGROUND

This matter is before the Board on referral from the United States District Court for the District of New Jersey in A.C.T. Truck Lines, Inc. v. L'Oreal Cosmetics & Fragrance Division/Cosmair, Inc. and Cosmair, Inc., Civil Action No. 93-3013 (referral order dated June 14, 1994). In the court proceeding, ACT, a common carrier, seeks to collect \$114,268.39 in transportation, detention, interest, photocopying, postage and other charges attributable to 89 shipments handled from Dayton, NJ, to Congers, NY, during the period July through November 1990.

L'Oreal filed a petition for declaratory order on August 12, 1994, and the ICC issued a procedural schedule on August 30, 1994. Petitioner's opening statement was filed on January 27, 1995; respondent's reply was filed on June 3, 1996; and petitioner's rebuttal was filed on June 18, 1996.

POSITIONS OF THE PARTIES

Petitioner argues that it owes no additional freight charges to ACT for three reasons: (1) petitioner's contract was not with ACT, but was with Small Parcel Service, Inc. (SPS), a deregulated freight forwarder; thus, the issue shipments are exempt from federal regulation, including the requirement that the parties

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the ICCTA.

adhere to rates contained in filed tariffs; (2) all of the issue shipments moved within the New York, NY Commercial Zone and, as such, are exempt from federal regulation, including the filed rate doctrine; and (3) the alleged rates sought to be collected by ACT for the issue shipments are unreasonable in violation of former 49 U.S.C. 10701(a).

Concerning the first issue, L'Oreal contends that, although ACT physically picked up its shipments, it had no direct dealings with ACT; it dealt only with SPS, a freight forwarder that contracted with ACT to pick up shipments at L'Oreal's facilities in Dayton, NJ, and carry them to SPS' facilities in Congers, NY, where they were broken down, sorted, and consolidated with other shipments into truckload shipments for movement by other carriers to various points within the United States. Petitioner adds that ACT billed the shipments on a collect basis to SPS,² the consignee, and that SPS then billed L'Oreal separately for services performed by SPS and ACT. In support of its position, L'Oreal presented affidavits from Ralph M. Folkes, Director of Assembly and Transportation for L'Oreal, and Gary Parisi, former owner and operator of SPS.

In its reply, ACT does not respond to this testimony or even dispute L'Oreal's assertions. Instead, its argument and the affidavit of Anthony L. Bianchi, manager of ACT, are devoted to its contention that the shipments were only the first segment of a continuous interstate movement of L'Oreal products intended by L'Oreal to continue on to points and places in various states beyond the territorial limits of the New York, NY Commercial Zone.

DISCUSSION AND CONCLUSIONS

The evidence³ clearly shows that L'Oreal arranged for its shipments with SPS, a freight forwarder. SPS then contracted with ACT and other carriers to pick up less-than-truckload palletized shipments at L'Oreal and deliver them to SPS. SPS then sorted the shipments into trailer loads, bar-coded the packages with United Parcel Service (UPS) shipping labels, contracted with carriers to haul the shipments to various UPS distribution points throughout the United States, and arranged for final destination delivery by UPS. ACT invoiced SPS and was paid a flat charge of \$325 per truckload by SPS. SPS separately billed L'Oreal for its services, which included the pickups by ACT at Dayton, NJ, and deliveries to SPS at Congers, NY. ACT does not dispute these facts.

² Neither party addresses the fact that some of the bills of lading petitioner submitted are marked "collect," while others are marked "prepaid." Because the evidence otherwise demonstrates that SPS, rather than ACT, acted as the carrier vis-a-vis L'Oreal, we do not believe the shipments represented by the bills marked "prepaid" were handled any differently, or that SPS and ACT acted in different capacities with respect to the shipments for which the bills are marked "prepaid."

³ Although the Bianchi affidavit alludes to meetings with L'Oreal to discuss shipments, it refers only to those discussions which concerned the routing of shipments beyond the New York, NY Commercial Zone. Mr. Bianchi does not assert that ACT met with L'Oreal to arrange for transportation.

A freight forwarder, by law, assumes responsibility for the transportation of a shipment from origin to destination and uses, for any part of the transportation, a carrier subject to Federal jurisdiction under Subtitle IV of Title 49 U.S. Code. 49 U.S.C. 13102(8) (1996). Thus, freight forwarders such as SPS perform dual functions. To the shipping public, they are carriers; to carriers with whom they contract to provide over-the-road transportation, they are shippers. Here, SPS, and not ACT, was the carrier insofar as L'Oreal was concerned, while ACT was the carrier insofar as SPS (in its capacity as shipper) was concerned: it was SPS, not L'Oreal, that selected ACT to be the carrier; it was SPS, not L'Oreal, that contracted with ACT; and it was SPS, not L'Oreal, that ACT billed at the time of shipment and whose name appeared on the bills of lading as shipper. Finally, it was SPS, not L'Oreal, that was responsible for, and paid, the freight charges billed by ACT.

In sum, SPS, not L'Oreal, filled the role of shipper here vis-a-vis ACT; and SPS, acting as an exempt freight forwarder, filled the role of carrier here vis-a-vis L'Oreal. As such, ACT cannot collect undercharges from L'Oreal for the subject shipments. Therefore, we will dismiss this proceeding.⁴

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is dismissed.
2. This decision is effective on its date of service.
3. A copy of this decision will be mailed to:

The Honorable William G. Bassler
United States District Court for the
District of New Jersey
U.S. Post Office and Court House, Federal Square
P.O. Box 999
Newark, NJ 07101

Re: Civil Action No. 93-3013

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.

Vernon A. Williams
Secretary

⁴ Because we are resolving this matter on the ground that there was no shipper-carrier relationship between L'Oreal and ACT, we need not address the commercial zone and rate reasonableness defenses raised by petitioner here. Nor do we discuss the "continuous interstate movement" argument raised by ACT, and the "jurisdictional/filed rate doctrine" argument raised by L'Oreal, as they are irrelevant.